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IN THE

Supreme Court of the United States

October Term, 1968.

No. 205.

MURCHISON AND COMPANY, a Delaware Corporation, and SUNRAY DX OIL COMPANY, a Delaware Corporation,
Petitioners,

v.

GLO CO., an Illinois Corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE REQUEST FOR A WRIT OF CERTIORARI TO REVIEW THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX D.

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OCTOBER TERM, 1968.

No. 205

MURCHISON AND COMPANY, A DELAWARE CORPORATION, AND SUNRAY DX OIL COMPANY, A DELAWARE CORPORATION,

Petitioners,

v.

GLO CO., AN ILLINOIS CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE REQUEST FOR A WRIT OF CERTIORARI TO REVIEW THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

This is Respondent's brief in opposition to the request for a Writ of Certiorari to review the Order of the United States Court of Appeals for the Third Circuit. See (A-3).

JURISDICTION.

While the petitioners do not note the statutory provision believed to confer on the Court jurisdiction to review the judgment in question by writ of certiorari it is 28 U. S. C. A. § 1254.

QUESTION PRESENTED.

1. Are there special and important reasons to review a Court of Appeals decision and order granting plaintiff a right to have its claims heard after the District Court had dismissed the case for lack of prosecution where

(1) there was no violation of the local rule of the District Court governing sua sponte dismissals for failure to prosecute;

(2) the District Court did not set the case down for a pretrial conference nor set the case for trial;

(3) defendants (here petitioners) never requested a pretrial conference or filed a motion for trial; and

(4) plaintiff, prior to the District Court's dismissal of the claim with prejudice, in an affidavit requested firm pretrial and trial dates.

STATUTES AND RULES INVOLVED.

Civil Rule 3 of the United States District Court for the District of Delaware reads as follows:

"Rule 3. *Calls of Calendar.*

There shall be a calendar call at the beginning of each term. The calendar shall consist of all cases pending 120 or more days prior to the time fixed for the call of the calendar. The call of the calendar shall be solely for the purpose of determining whether there has been any undue delay in connection with pending matters. Attorneys fully informed and with authority to speak will be expected to be present and explain the status of each case and any apparent unusual delay and, if called upon do so, agree upon expediting action which will be taken. The Court will then take such action, including the dismissal of cases, after notice, as is deemed to be

in the best interest of the proper administration of justice."

Civil Rule 11 of the United States District Court for the District of Delaware, in part, reads as follows:

"Rule 11. *Pretrial.*

A. . . . .

B. Unless otherwise ordered all civil cases shall be set for pretrial. Reasonable notice of the time and place of such pretrial shall be given by the Clerk by mail to counsel of record. Unless otherwise ordered counsel who will conduct the trial are required to appear before the Court for the pretrial conference. Should an attorney for a party fail to appear at a pretrial conference or to participate therein or to prepare therefor or to cooperate in the preparation of the pretrial order specified in Paragraph D hereafter, the Court, in its discretion, may hold a pretrial hearing, ex parte or otherwise, and after notice, enter an appropriate judgment or order.

C. . . . .

D. . . . .

E. . . . ."

Civil Rule 13 of the United States District Court for the District of Delaware, in part, reads as follows:

"Rule 13. *Assignment of Cases; Trials and Arguments.*

A. . . . .

B. Upon motion, cases will be set for trial by the judge to whom the case has been assigned. Jury trials, unless otherwise ordered, will take place in November,

February and May. Any party otherwise entitled to a jury trial who desires to have a trial date fixed shall move therefor at least 30 days before the first day of November, February or May, as the case may be. The motion shall contain a statement of the approximate time required for trial. Unless a written opposition stating the grounds thereof is served and filed within 5 days after the filing of a motion, the case may be fixed for trial in accordance with the motion. Any written opposition which is filed shall be disposed of promptly. C. . . . ."

STATEMENT OF THE CASE.

The petitioners omitted the following relevant facts from their discussion of the case:

1. The answer of Sunray DX Oil Company to the amended complaint, filed on January 18, 1965, admitted then owing plaintiff the sum of $3,624.45 arising out of an overriding royalty interest reserved to the plaintiff. (Appellant's Appendix in the United States Court of Appeals for the Third Circuit, p. 67a.)

2. On September 21, 1965 the District Court had its annual calendar call and this case was on the calendar. The "call of the calendar (is) solely for the purpose of determining whether there has been any undue delay in connection with pending matters." (See Civil Rule 3 of the United States District Court for the District of Delaware quoted *infra* at p. 3.) At the conclusion of the discussion of this case between counsel for all parties and the Court, the Court said nothing about delay but rather passed on to the next case on the list thanking counsel for the plaintiff for his report. See Docket Entry No. 61 in the United States District Court for the District of Delaware.

3. By letter dated April 18, 1966 the District Court (law clerk of the Judge to whom the case had been assigned) wrote to all counsel asking "when this case can be scheduled for trial". (See Appellees' Appendix in the United States Court of Appeals for the Third Circuit, p. 12b.) Counsel for plaintiff replied to this inquiry advising the Court, in part, as follows:

> "I have your law clerk's letter dated April 18, 1966, concerning the disposition of the above captioned action which has been pending for over 11 years. As your Honor may recall, our associate who

is in charge of this action practices in Chicago, Illinois.

I communicated with him in September of 1965. At that time, he advised me that with an exchange of information via interrogatories and several depositions, the case could be ready for trial during the Fall of 1966. I have again written to him since receiving your law clerk's letter. Shortly, I shall be in a position to better inform the Court of his intentions with regard to the disposition of this case." (*Id.*, p. 18b)

4. The next action taken in this case was the District Court's issuance of the rule, pursuant to Rule 12 of the Court, to show cause why the case should not be dismissed for lack of prosecution.

5. At the hearing on the return of this rule to show cause (see Appellees' Appendix in the United States Court of Appeals for the Third Circuit, pp. 25b-48b) plaintiff's local counsel asked the District Court to set "a firm trial date now (then) with pretrial conference". Counsel also agreed that a violation of the Court's order establishing pretrial and trial dates "would cause the case to be dismissed". (*Id.*, p. 27b). At this time local counsel for plaintiff filed an affidavit explaining the situation and again requesting that the Court set pretrial and trial dates. (See Appendix attached hereto at B-1-4; see also Appellant's Appendix in the United States Court of Appeals for the Third Circuit, p. 97a and 99a.)

REASONS FOR DENYING THE WRIT.

1. The Decision Below Is Not in Conflict With Any Other Decision.

Petitioners argue that the United States Court of Appeals for the Third Circuit did not find that the District Court abused its discretion in dismissing the claims without a trial and after plaintiff requested a trial. This argument is semantic only. To be sure the Court below did not use the words "abuse of discretion" in its Order but the Court's holding is the equivalent of finding an abuse of discretion. Petitioners cannot argue that the Court was unmindful of the applicable standard as their brief called it to the Court's attention on frequent occasions. (See Appellees' Brief (not on reargument) in the United States Court of Appeals for the Third Circuit, pp. 1, 12, 13, 18, 20, 23 and 26.) Moreover, the Opinion itself states that, "Plaintiff says that the dismissal was an abuse of judicial discretion." (Petitioners' Appendix, p. A-2). Petitioners' argument that the Court of Appeals thereafter did not consider whether there was an abuse of judicial discretion when it held for the plaintiff is specious and unworthy of further consideration here or by the Court.

There are decisions from the Third Circuit and other circuits affirming a dismissal of a claim for lack of prosecution. However, none of the cases cited by petitioners are contrary to the opinion sought to be reviewed here. In not one of the cases did plaintiff's counsel request a pretrial hearing, a firm trial date and not violate an order of the Court prior to the dismissal of the case. The Opinion below sets forth this vital distinction for all to see. "Upon return of a subsequent order to show cause, issued on June 3, 1966, plaintiff's counsel assured the Court that the mat-

ter would be moved for trial." (Petitioners' Appendix, p. A-2). Moreover, in most of the cases cited by petitioners either a rule or an order had been violated. This is not the case here.

Civil Rule 12 of the United States District Court for the District of Delaware states that when "no action has been taken for a period of one year, the Court may . . . enter an order dismissing such cause. . . . After any such application for dismissal has been filed, no application for a continuance or any proceeding taken under the discovery rules, F. R. C. P., shall be deemed to toll the application of this Rule."

In this case plaintiff requested a trial prior to the dismissal. While a request for a continuance and a proceeding under the discovery rules will not operate to toll the rule, a request for a pretrial and trial will and should. A motion for trial is not a request for a continuance and it is not discovery. The Rule specifically states what will not toll the application of the Rule. Other "action" taken will toll the operation of the Rule. A written request for a pretrial hearing and a firm trial date was "action" taken within the period of one year prior to order of dismissal. Indeed, it is difficult to think of more significant actions. Thus, there was no violation of the Local Rule 12 and the District Court abused its discretion as the Court of Appeals for the Third Circuit held.

Petitioners complain that the Opinion below does not set forth meaningful standards for other courts to follow. There is only one standard in this case to be followed and the Opinion sets it forth—Do not dismiss, sua sponte, for lack of prosecution a claim when the plaintiff requests a pretrial hearing and a firm trial date prior to dismissal and the defendant has never moved for trial or dismissal pursuant to F. R. C. P. 41(b). (Petitioners' Appendix, p. A-1, 2.)

2. The Decision Below Has a Salutory Effect On Judicial Administration.

The District Court's Order dismissed plaintiff's claims with prejudice after plaintiff had asked for pretrial and trial dates. While orders of this kind would clear clogged Court dockets, justice would be denied. Our judicial system was established to operate to dispose of claims on their merits and not on any other basis.

Chief Justice Warren's comments as quoted by Petitioners are apt and not disputed. However, Petitioners' parade of horribles is nothing more than advocacy for their clients.

The lesson of the Opinion below is both easily found and applied. Courts should not tolerate unnecessary and unreasonable delay. If and when a case reaches this stage, a Court should order a pretrial hearing. If there is unreasonable delay then or non-compliance with the Court's order concerning the pretrial hearing, the Court may dismiss. *Link v. Wabash Railroad Co.*, 370 U. S. 626 (1962). Secondly, the Court has the inherent power or the power by rule to thereafter set a case for trial. If there is delay at trial or the violation of the Court's order concerning trial, the case may be dismissed. See *Torino v. Texaco, Inc.*, 378 F. 2d 268 (C. A. 3, 1967).

Conveniently, Petitioners forget that the defendant before a Court also has substantial control over delay. Federal Rule of Civil Procidure 41(b) gives the defendant the right to move for dismissal if the plaintiff has failed to prosecute his case or failed to comply with the rules or any order of the Court. The defendants (Petitioners) never moved to dismiss this case for lack of prosecution or for an alleged violation of a rule or order. Their complaints of delay are shallow and without substance.

CONCLUSION.

The Petitioners fail to analyze the cases they claim to be in conflict wtih the decision of the Court of Appeals for the Third Circuit. No case can be found where a claim was dismissed for lack of prosecution and plaintiff had requested a pretrial hearing and the setting of a trial date prior to dismissal. Perhaps Petitioners' lack of factual analysis is explainable when it is noted that they failed to inform the Court that plaintiff had moved for trial. Petitioners did not note plaintiff's counsel's request for trial made at the hearing and by affidavit filed prior to dismissal.

Docket delay is a serious problem in the administration of justice. Assuming an adequate number of judges and courtrooms, the problem is solved by trying cases—not dismissing them without a trial.

Therefore, it is respectfully submitted that Petitioners' request for the issuance of a Writ of Certiorari to review a decision of the Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

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APPENDIX D.

Affidavit of William T. Lynam, III to Show Good Reason for the Inaction in This Action.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

C. A. No. 1659.

GLO CO., AN ILLINOIS CORPORATION,

Plaintiff,

v.

MURCHISON AND COMPANY, A DELAWARE CORPORATION, BARNSDALL OIL COMPANY, A DELAWARE CORPORATION, AND SUNRAY OIL CORPORATION, A DELAWARE CORPORATION,

Defendants.

William T. Lynam, III, being first duly sworn did depose as follows:

1. He is presently local counsel for plaintiff in the above action.

2. Primary counsel for plaintiff is Thomas Hart Fisher of Chicago, Illinois. Mr. Fisher represented plaintiff in a similar action in Texas. See Glo Co. v. Murchison, et al., 208 F. 2d 714 (5th Cir. 1954), reh. den., 210 F. 2d 372, cert. den., 348 U. S. 817 (1954).

3. Mr. Fisher is now at his law office at Caf Saint-Pierre Departement duVar, Paris, France. Mr. Fisher has been in Europe since some time in late May 1966 and must remain in Europe until the last half of August because of firm business commitments.

4. Mr. Fisher wrote to me by letter dated June 15, 1966, and informed me that plaintiff is "ready, able and willing to go to trial". He suggests that he could and would try this case at almost any date after September 1, 1966. A trial date and a pre-trial conference date may now be set by the Court.

5. This is a case which needs relatively little discovery prior to trial. Plaintiff needs now to know the quantity and value of all minerals produced by defendants, or on their behalf, or by others claiming under them, from the lands described in Exhibit 1 attached to the Amended Complaint.

6. It should be noted that Sunray admits owing plaintiff $3,624.45 as of January 18, 1965. See paragraph 8 of its Answer.

7. The basic reason for inaction on plaintiff's part is a lack of communication. Mr. Fisher has been under the firm belief that this Court would set the case for trial. He believes that plaintiff has no "affirmative duty" to schedule the case for trial.

8. Plaintiff's local counsel interpreted the Court's letter to all counsel dated April 18, 1966, as a request for counsel to agree on a trial date. Plaintiff's local counsel responded that with some discovery the case "could be ready for trial during the Fall of 1966". The next communication plaintiff received from the Court was a copy of the Order now in issue.

9. Plaintiff's local counsel has spent about twelve to fourteen hours during the last ten days familiarizing himself with the facts of this case as well as the Texas law. It is now understood that he will take an active role in the prosecution of this claim.

10. Secondly, a partial reason for plaintiff's inaction is that plaintiff's local counsel told the Court at the last call of the calendar that this case would be tried either during the late Spring or early Fall of 1966. Neither the Court nor Defendants' counsel commented upon this case at that time. The events of the call of the calendar were related to Mr. Fisher and he responded that the case could be tried this year.

11. Defendants have not diligently pressed this claim toward trial nor have they pursued a course where the validity of their defenses might be determined before a trial.

12. Defendants have not suffered any prejudice as a result of plaintiff's delay in this case.

W. T. Lynam, III,
William T. Lynam, III,
Wilson and Lynam,
306 Delaware Trust Building,
Wilmington, Delaware,

Sworn to and subscribed before me this 27th day of June 1966.

.....

Notary Public.